IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

GOOD LUCK GLOVE COMPANY, a Corporation,
Petitioner,
vs.
CHESTER BOWLES, Administrator, OFFICE OF PRICE ADMINISTRATION,
Respondent.

No. 618

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Good Luck Glove Company, a corporation, respectfully petitioning, shows this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

On November 3, 1943, the Administrator brought suit in the United States District Court for the Eastern District of Illinois against petitioner, alleging that petitioner had

violated the Emergency Price Control Act of 1942, as amended, in that petitioner had sold and delivered work gloves manufactured by it at prices in excess of the maximum prices fixed by General Maximum Price Regulation, as amended. The Administrator asked, in Count I, for an injunction (R. 8) and, in Count II, for treble damages and judgment against petitioner in the amount of $250,000 (R. 9-10). Count III of the complaint is not now involved.

The District Court, after introduction of evidence and a full hearing on the application for injunction, filed a written opinion (R. 124) together with certain findings of fact and conclusions of law (R. 131), and entered judgment denying the motion for preliminary injunction (R. 133) on the ground that the Administrator had not shown by the evidence that the petitioner had engaged or was about to engage in any acts or practices constituting a violation of the Emergency Price Control Act of 1942, or the General Maximum Price Regulation issued thereunder. The opinion of the District Court is reported in 52 Fed. Supp. 942.

Respondent appealed from that judgment and the Circuit Court of Appeals affirmed the same (R. 168). The opinion of the Circuit Court of Appeals is reported in 143 Fed. (2d) 579.

Thereafter, on July 26, 1944, petitioner filed its motion in the United States District Court for a summary judgment as to Count II (R. 3). A hearing was had on the motion for summary judgment and affidavits filed by the parties, and the District Court readopted its findings of fact and conclusions of law on the former hearing (R. 150), and entered judgment on the merits in favor of petitioner as to Count II (R. 152).

II.

RULING OF CIRCUIT COURT OF APPEALS.

On appeal by respondent from the summary judgment in favor of petitioner, the Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the cause (R. 170). The opinion (R. 168) is reported in 150 Fed. (2d) 853. The Court gave the following reasons for reversing its former decision:

(1) That the decision in the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), had the effect of holding that the previous opinion expressed by the Circuit Court of Appeals in the injunction proceeding was erroneous;

(2) That the decision in the **Seminole** case was not distinguishable on the ground that a different price regulation was involved;

(3) That the decision in the **Seminole** case required a reversal of the summary judgment in favor of petitioner notwithstanding certain undisputed facts appearing in the record relating to a general price increase by petitioner on March 20, 1942, and delivery of gloves during March 1942, at the increased prices.

III.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended [28 USCA 347(a), C. 426, 48 Stat. 926].

The opinion of the Circuit Court of Appeals was filed August 3, 1945 (R. 169). On August 17, 1945, within the time permitted, petitioner filed its petition for rehearing (R. 170), which was denied on September 11, 1945 (R. 171).

This petition was filed before the expiration of three months from September 11, 1945.

IV.

STATEMENT OF THE FACTS.

Petitioner is engaged in the manufacture and sale of work gloves. Its sales are principally to wholesalers, jobbers and mail order houses. On March 20, 1942, it published a new price list setting forth new prices for all of its various types or models of work gloves, of which over four thousand copies were mailed to prospective customers (R. 56, 131). This superseded its last previous price list issued December 15, 1941.

The General Maximum Price Regulation was issued April 28, 1942, to become effective May 11, 1942. While the General Maximum Price Regulation did not fix dollars and cents ceiling prices, it was designed to fix ceiling prices at the current prices prevailing in March 1942.

During the month of March 1942 petitioner received and accepted new orders for work gloves at its new March 1942 prices from more than three hundred customers in an amount exceeding $100,000.00, and, pursuant thereto, deliveries were made during March 1942 at such increased prices of many of petitioner's different work glove models (R. 57, 131).

Petitioner did not, at any time after March 1942, sell, ship or deliver any of its work gloves at a price or prices higher than those specified in its March 1942 price list (R. 3, 131).

The only work gloves delivered by petitioner during the month of March 1942 at prices less than the March 1942 price list were deliveries of certain models made pursuant to firm commitments and contracts which had been entered into prior to the month of March 1942 (R. 4, 58, 131).

Some models of petitioner's work gloves were not delivered at all during March 1942 (R. 57).

For each model or type of glove not sold and delivered by petitioner during March 1942 at the prices shown in

its March 1942 price list, there was an identical or substantially equivalent model or type of glove which was actually sold and delivered by petitioner during March 1942 at the increased prices fixed in the March 1942 price list (R. 129, 148).

Thus, four situations are involved:

(1) Actual sales and deliveries in March 1942 of large quantities and numerous models of petitioner's work gloves at the new March 1942 prices for the respective models (R. 57);

(2) Deliveries of certain models during March 1942 solely pursuant to prior commitments or contracts at prices lower than the increased prices established for those models by the new March 1942 price list (R. 58);

(3) No deliveries during March 1942 of some models listed on the March 1942 price list (R. 57);

(4) As to models not delivered during March 1942 at the increased prices (which includes those models delivered at lower prices because of prior firm commitments), there were identical or substantially equivalent models which were sold and delivered during March 1942 at the increased prices (R. 129, 148).

Respondent admits that the March 1942 price list fixed the legal maximum prices:

(a) as to all models sold and delivered during March 1942 at the prices shown on said price list; and

(b) as to all models which were not delivered at all during March 1942.

But respondent contends that, as to those models of gloves which were delivered during March 1942 **only** under pre-existing contracts at prices lower than the

March 1942 price list, the prior contract prices at which they were delivered constitutes the petitioner's maximum prices for those particular models, notwithstanding Amendments 23 and 38 to General Maximum Price Regulation and notwithstanding the undisputed facts as found by the trial Court of actual sales and deliveries during March 1942 of identical or substantially equivalent models at the increased March prices shown on petitioner's March 1942 price list.

The entire transcript of the hearing on the application of the Administrator for a temporary injunction, together with the opinion of the District Court and the findings of fact, conclusions of law and judgment, were made a part of petitioner's motion for summary judgment (R. 4).

The finding of the District Court that petitioner and its officers, during all of the time involved in this suit, believed in good faith that they were complying with the applicable provisions of the General Maximum Price Regulation (R. 132) has not been challenged.

V.

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals erred in holding that, in view of the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), its former opinion in the injunction case and the summary judgment of the District Court in this case were erroneous.

2. Whether the Circuit Court of Appeals erred in not giving any consideration to the findings of fact by the District Court that for each glove model not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased March 1942 prices.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals has erroneously held that the decision of this Court in **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), was conclusive against petitioner. The facts in this record are materially different, the Regulation involved is different, Amendments 23 and 38 to the General Maximum Price Regulation are involved here but were not involved in the **Seminole** case, and the Circuit Court of Appeals has misapplied the rule of law announced in the **Seminole** case with respect to the construction of Maximum Price Regulation 188. The important federal question as to the proper construction of the General Maximum Price Regulation as amended, has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has erroneously disregarded the findings of fact by the District Court that for each glove model or type of glove not sold and delivered during March 1942, the petitioner did sell and deliver during March 1942 an identical or substantially equivalent model at the increased March 1942 price. The proper construction of the General Maximum Price Regulation, where identical or substantially similar commodities were delivered during March 1942, is an important question of federal law which has not been, but should be, settled by this Court.

3. The grievous and obvious error of the Circuit Court of Appeals in the two foregoing respects places in grave jeopardy the entire business of this petitioner (treble damages being asserted in the amount of $250,000), notwithstanding that its good faith stands unchallenged and that it never sold a glove in excess of the increased prices announced by its March 1942 price list.

Wherefore, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the case of **Chester Bowles, Admr., Office of Price Administration, v. Good Luck Glove Company**, No. 8696, and that the decree of said Circuit Court of Appeals in said cause be reversed, and that petitioner have such other and further relief in the premises as to this Court may seem just.

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PETITIONER'S

BRIEF

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court denying an injunction on the ground that petitioner had not violated the General Maximum Price Regulation appears at pages 124-130 of the record, and is reported in 52 Fed. Supp. 942.

The opinion of the Circuit Court of Appeals affirming that judgment is reported in 143 Fed. (2d) 579.

The District Court, in rendering summary judgment for petitioner, readopted the findings of fact, conclusions of law, and written memorandum entered by the Court on the injunction hearing (R. 151), and judgment on the merits for petitioner as to Count II of the complaint was entered without further opinion (R. 152).

The opinion of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment in favor of petitioner, filed August 3, 1945, appears at pages 168-9 of the record, and is reported in 150 Fed. (2d) 853. No opinion was filed overruling petitioner's motion for rehearing (R. 171).

II.

JURISDICTION.

A statement particularly disclosing the jurisdiction of this Court is set out in the foregoing petition at page 3.

III.

STATEMENT OF THE CASE.

A statement of the facts is made in the foregoing petition at pages 4-6, and is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred:

1. In holding that the decision in the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945) required a reversal of the judgment in favor of petitioner.

2. In reversing the judgment of the District Court notwithstanding the findings of fact, the correctness of which the Circuit Court of Appeals did not question, that for each glove model not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased prices fixed by its March 1942 price list.

V.

ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the decision of this Court in the Seminole case was conclusive against petitioner under the facts in this record.

The suit in the **Seminole** case was under Maximum Price Regulation 188. The suit in this case is under the General Maximum Price Regulation and Amendments 23 and 38 to that Regulation. This Court carefully pointed out in its opinion in the **Seminole** case* that neither of these amendments to the General Maximum Price Regulation was in issue in that case. Both of these amendments are in issue in this case and appear, together with the Administrator's press releases in connection therewith, at pages 97-104 of the record. Furthermore, as petitioner points out below, the facts in this case are so materially different from those in the **Seminole** case that the latter should not be controlling even if there were no substantial differences in the applicable price regulations.

The decision by the Circuit Court of Appeals places on the same basis a seller who made no general price increase prior to April 1, 1942, and a seller who made such a general price increase but happened to be bound by prior firm commitments to make certain deliveries during March 1942, of some of his line at the lower contract prices. The General Maximum Price Regulation and the opinion of this Court in the **Seminole** case recognize a clear distinction between the two cases.

Petitioner now points out the first significant distinction between this case and the **Seminole** case.

In the **Seminole** case there was no evidence of a general price increase during March 1942. In this case petitioner issued and circulated its new price list on March 20, 1942,

*89 L. Ed. Adv. Op. 1186, footnote 9, at p. 1190, 65 S. Ct. 1215 at p. 1219.

and distributed it to more than four thousand prospective customers (R. 125, 131). During March 1942 it accepted new orders for work gloves at the March 1942 prices from more than three hundred customers in an amount exceeding $100,000 (R. 57, 131). It did not, at any time after March 1942, ship, sell or deliver any work gloves at a price or prices higher than those specified in its March 1942 price list (R. 125), and on the hearing respondent conceded that petitioner never charged more than its March 1942 offering prices (R. 48). Petitioner did not, during March 1942, make any deliveries of gloves at prices less than those shown in its March 1942 price list (R. 58, 75), except deliveries which it was obligated to make under pre-existing firm contracts (R. 125), and under the amendments to General Maximum Price Regulation such deliveries are not controlling as to the legal maximum prices which may be charged.

Amendments 23 and 38 to the General Maximum Price Regulation (R. 97-104) have been carried into the text of the Regulation as a proviso following Sec. 1499.2, paragraph (c), which proviso reads as follows (R. 121):

> "Provided, however, that (1) if before April 1, 1942, the seller raised his prices for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except those to whom he was bound to make delivery or supply during March 1942, pursuant to a firm commitment made before the price rise) and
>
> "(2) If during March 1942, he delivered the commodity or supplied the service at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942, shall be deemed to be:

> "(i) The seller's increased offering price to such class of purchasers for delivery or supply during March, 1942, or * * *."

In this case the increased offering price is represented by petitioner's March 1942 price list; it constitutes an offering price under respondent's definition of that term in Sec. 1499.2 of the Regulation (R. 123).

That it was the intent of the Administrator to allow a general price increase which was put into effect prior to April 1, 1942, to be applied to purchasers after the termination of pre-existing contracts, is made manifest by the press releases which accompanied the amendments (R. 97-104). These declared that:

> "Sellers who made general price increases prior to April 1 are authorized * * * to apply the increases to ceiling prices for goods and services delivered last March under long term contracts."

The press releases specifically declared that:

> "The effect is to allow one who, last March, delivered at prices established by a contract signed many months before and who raised his prices **generally** before April 1st, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March" (R. 101, 127).

The contention of respondent that there must have been, during March 1942, an actual sale and delivery of each special type or model of glove at the March prices, makes entirely meaningless the proviso above quoted. If each type or model manufactured by petitioner were delivered in March 1942 at its increased offering price determined by its March 1942 price list, **then such delivery at such price would, of itself, establish the legal maximum price under the first part of Sec. 1499.2, and there would be no occasion for the proviso.** The proviso

can only be given effect in cases where there was a general price increase prior to April 1, 1942, and certain deliveries were made only under firm commitments entered into before the month of March 1942.

Even under the restricted and erroneous construction which respondent now places upon the Regulation, it appears from this record that petitioner, prior to April 1, 1942, did make a general price increase for a "commodity" (work gloves) to all classes of purchasers except those to whom it was bound to make deliveries during March 1942 pursuant to a firm commitment made before such general price increase; that during March 1942 petitioner delivered the "commodity" (work gloves) at the increased prices to "classes of purchasers" who had no pre-existing contracts; and that the "commodity" was also delivered to other purchasers at a lower price **but only** under firm commitments made before the general price increase. Under these circumstances, in order to allow petitioner to apply the price rise to any class of purchasers to which no delivery or supply was made during March 1942 after the price rise (except purchasers under a firm commitment made before the price rise) the proviso above quoted declares that the highest price charged during March 1942 shall be the seller's increased offering price. Thus, the clear intent of the Administrator was to "freeze" ceiling prices on a manufacturer's line, **where a general price increase had been put into effect by legitimate offering prices**, at the current March 1942 levels and not to penalize the manufacturer by ceiling prices determined by prior contract commitments. In the **Seminole** case there was no general offering price of the commodity, but only two contracts, both pre-existing, with the only delivery in March 1942 at the lower of the two contract prices. That was a wholly different situation than the situation existing in this case. With both the facts and the applicable regulation materially different,

the Circuit Court of Appeals obviously erred in its belief that the **Seminole** case required it to reverse its own former view.

The Circuit Court of Appeals has thus decided an important question of federal law which has not been, but should be, settled by this Court, and particularly is this the case where it has erroneously based its ruling on a decision of this Court in a case where the facts are substantially different and the applicable maximum price regulation contains substantially different provisions.

2. **The Circuit Court of Appeals further erred in disregarding the findings of fact made by the District Court that for each glove model or type of glove not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased March 1942 prices.**

Petitioner now points out the second significant distinction and fundamental difference between this case and the **Seminole** case as to which the Circuit Court of Appeals clearly erred. It is the legal effect of a sale and delivery by petitioner in March 1942 at the increased March 1942 prices of identical or substantially equivalent models or types of work gloves.

The Circuit Court of Appeals erroneously held that the District Court made no findings of fact as to this. The District Judge, at the close of his opinion, states:

> "This memorandum shall constitute a part of my findings of fact and conclusions of law adopted contemporaneously herewith" (R. 130).

On the hearing for summary judgment, the District Court readopted its findings of fact entered on the injunction hearing, "together with the written memorandum of the Court" (R. 151).

On the injunction hearing many models of gloves were offered in evidence (R. 72), and the District Court found:

> "In short, for all practical purposes, for each model not sold in March, there is an identical or equivalent model that was sold. This is identity in the contemplation of the practical determination of law" (R. 129).

In connection with the summary judgment hearing, the record further shows the following in the affidavit of petitioner's Vice President in charge of sales:

> "* * * that for every lot number or description of glove not actually sold and delivered by the defendant during the month of March 1942, at the prices shown in the March 1942 price list, there was an identical or substantially equivalent glove sold and delivered by the defendant during March 1942 at the prices fixed in the March 1942 price list" (R. 148).

A single illustration will make the findings of fact of the District Court abundantly clear. We refer to glove models 172 and 172N. The material, cost and construction of these two gloves are identical, and both always sold at the same price. The only difference between them is that one has the twill side of the cloth to the palm and the nap to the outside, while the other has the nap side of the cloth to the palm and the twill to the outside (R. 59-60). Model 172 was not sold or delivered except under pre-existing contracts. Model 172N was sold and delivered during March 1942 at the March 1942 prices. Respondent admits that subsequent sales and deliveries of glove model 172N at the March 1942 price were lawful sales, but contends that subsequent sales of glove model 172 at the March 1942 prices violated the General Maximum Price Regulation.

None of the foregoing evidence is disputed and the findings of fact with respect thereto as made by the trial court, under well-established principles of law, are conclusive on appeal. Therefore, in legal effect, there was a sale and

delivery by petitioner of all of its glove models during the month of March 1942 at the March 1942 increased prices, because any reasonable application of the phrase "the same commodity" contained in Section 1499.2 (a) (1) of General Maximum Price Regulation includes equivalent models. No question of the sale and delivery of identical or substantially equivalent commodities was involved in the **Seminole** case.

This important question of federal law has been erroneously decided by the Circuit Court of Appeals and has not been, but should be, settled by this Court. Particularly is this the case where the error of the Circuit Court of Appeals is the result of its failure to give consideration to the findings of fact by the trial court, the correctness of which findings was not questioned by the Circuit Court of Appeals.

In conclusion, it is submitted that both of the reasons relied on for allowance of the writ are vital and fundamental. If this Court should fail to review and correct the misapprehension of the Circuit Court of Appeals that the **Seminole** case required it to change its own prior opinion in the instant case and to reverse the summary judgment of the District Court, and should fail to correct the clearly erroneous interpretation placed on the proviso amending General Maximum Price Regulation (R. 121-122), or should fail to correct the error committed by the Circuit Court of Appeals in disregarding the findings of fact by the District Court as to the sale and delivery of identical or substantially equivalent models or types of "the same commodity," a grave injustice will have occurred with an exceedingly serious financial result to this petitioner ($250,000 asserted damages). While, of course, it does not appear in this record, other litigants who acted with equal good faith in the manufacture

and sale of work gloves are faced with exactly the same questions and unless this Court shall review and correct the ruling in the instant case, a precedent will have been established under which other companies* similarly situated will also be forced to pay heavy damages under a construction of an administrative regulation which is unjust and inequitable and which Congress never intended to sanction by any language to be found in the Emergency Price Control Act. The questions presented are, accordingly, of such general and far-reaching importance that they should be settled by this Court.

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* See Appendix hereto for list of suits pending.

APPENDIX

APPENDIX.

List of other suits filed by the Office of Price Administration against work glove manufacturers involving like alleged price violations and known by this petitioner to be pending:

Bowles, Adm'r, v. Boss Manufacturing Company, pending in U. S. District Court, Southern District of Illinois, Northern Division;

Bowles, Adm'r, v. Universal Glove Company, pending in U. S. District Court, Northern District of Ohio, Western Division;

Bowles, Adm'r, v. Wells Lamont Corporation, pending in U. S. District Court, Northern District of Illinois, Eastern Division;

Bowles, Adm'r, v. Indianapolis Glove Company, Application to U. S. Supreme Court for writ of certiorari to Seventh Circuit Court of Appeals.

The aggregate damages asked by the Administrator in these cases is in excess of $500,000.

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AUTHORITIES CITED

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In the Supreme Court of the United States

OCTOBER TERM 1945

No. 618

GOOD LUCK GLOVE COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying the Administrator's application for a preliminary injunction (R. 124) is reported in 52 F. Supp. 942. The opinion of the Circuit Court of Appeals affirming the order of the district court denying a preliminary injunction is reported in 143 F. 2d 579.

The district court rendered no opinion when it granted petitioner's motion for summary judg-

ment (R. 150). The opinion of the Circuit Court of Appeals reversing the judgment of the district court (R. 168) is reported in 150 F. 2d 853.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on August 3, 1945 (R. 170). A petition for rehearing was filed on August 17, 1945 (R. 170) and denied on September 11, 1945 (R. 170). The petition for a writ of certiorari was filed in this Court on November 20, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945.

QUESTION PRESENTED

Whether under the General Maximum Price Regulation, as amended by amendments 23 and 38, the maximum price at which a manufacturer of work gloves may sell certain models of such gloves is the highest price at which it actually delivered such models in March 1942, or its offering price for such models in March 1942, where the only deliveries of such models were made under contract made before March 1942.

STATUTES AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. IV, 901 et seq.,), hereinafter referred to as the Act, as amended by the Stabilization Act of 1942 (56 Stat. 765, 50 U. S. C. App., Supp. IV, 961

et seq.), the Stabilization Extension Act of 1944 (58 Stat. 632), the Stabilization Extension Act of 1945 (Public Law 108, 79th Cong. 1st Sess.), and the General Maximum Price Regulation (7 F. R. 3153), as amended by Amendment 23 (7 F. R. 6615) and Amendment 38 (7 F. R. 10155).

The Act (Section 2 (a)) authorizes the Administrator to establish, by regulation or order, such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act.

Section 205 (e) of the Act as originally enacted provided that anyone selling a commodity at a price in excess of that permitted by a regulation establishing maximum prices should be liable for three times the amount of the overcharge—to the buyer if the commodity were purchased for use or consumption other than in the course of trade or business, otherwise to the Administrator. As amended by the Stabilization Extension Act of 1944, the section provides that the seller's liability shall be restricted to the amount of the overcharge if he proves that the violation of the regulation was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation. By the express terms of the Stabilization Extension Act, this amendment is made applicable to pending actions.

The General Maximum Price Regulation was issued by the Price Administrator on April 28,

1942 (7 F. R. 3153). It establishes prices for all commodities not expressly excepted or subject to a different regulation. At all material times involved in this action work gloves were among the commodities subject to the Regulation.

The Regulation (Section 2) provides that the maximum price at which any seller may sell any commodity shall be (a) the highest price charged in March 1942 by the same seller for the same commodity; or (b) if he made no such charge in that month for the same commodity the highest price charged by the same seller for the similar commodity most nearly like it; or (c) if he made no such charge in that month either for the same commodity or a similar commodity, the highest price charged by the seller's closest competitor for the same commodity or the similar commodity most nearly like it. The Regulation then defines the term "highest price charged by a seller in March 1942" as meaning:

> (a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942 to a purchaser of the same class; or
>
> (b) If the seller made no such delivery or supplied no such service during March 1942, his highest offering price for delivery or supply during that month to the purchaser of the same class; or
>
> (c) If the seller made no such delivery or supplied no such service and had no

such offering price to a purchaser of the same class, the highest price charged by the seller during March 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers.

STATEMENT

This action was brought by the Price Administrator to restrain the petitioner from violating the General Maximum Price Regulation and Supplementary Regulation 14 as revised and amended (8 F. R. 4486, 9787)[1] and to recover statutory damages under Section 205 (e) of the Act because of alleged violations of those Regulations.

The Administrator applied for a preliminary injunction (R. 16). At the conclusion of the hearing on this application, the following facts were found by the district court (R. 124, 131–132):

Petitioner is a manufacturer of work gloves. It makes and sells 480 models of gloves. In March 1942 it issued a new price list for its products. The prices quoted on this list were higher than those shown on a price list which petitioner issued in December 1941 and higher than

[1] The provisions of the Supplementary Regulation are not pertinent to the determination of any question presented by the petition for certiorari.

those which petitioner had previously charged. The highest price at which petitioner actually delivered ten models of its gloves in March 1942 were prices which were less than those shown on its March 1942 price list. All deliveries of these models in March 1942 were made under contracts made before March 1942. After the General Maximum Price Regulation became effective, it sold the ten models in question at prices in excess of those at which it had actually delivered them in March 1942, namely, at the prices shown on its 1942 price list. At the time the sales were made the maximum prices at which the gloves could be sold were governed by the General Maximum Price Regulation.

On these facts, the district court held that petitioner had not violated the General Maximum Price Regulation and, therefore, denied the Administrator's application for an injunction (R. 133). 52 F. Supp. 942. On appeal, the Circuit Court of Appeals affirmed. 143 F. 2d 579.

Thereafter, petitioner moved for summary judgment on the second count of the complaint, in which the Administrator sought a recovery of statutory damages for alleged violations of the General Maximum Price Regulation (R. 3). The motion was heard on affidavits and the record of the proceedings on the application for a preliminary injunction.

The affidavit submitted by petitioner averred the facts set forth in the findings which the court made at the time it denied the application for a preliminary injunction (R. 5). The affidavit submitted by the Administrator showed that after the effective date of the General Maximum Price Regulation, petitioner had sold 115 models of gloves at prices higher than the prices at which it delivered the same models in March 1942 (R. 135–137). In rebuttal petitioner submitted an affidavit averring that after the effective date of the General Maximum Price Regulation petitioner had not sold any gloves at prices in excess of those shown on its March 1942 price list; that in cases where after the effective date of the General Maximum Price Regulation it sold any model at a price in excess of that at which it had delivered the model in March 1942, it had sold and delivered an identical or substantially equivalent model in March 1942 at the price quoted in the March 1942 price list (R. 148); and that petitioner had been unable to identify the models referred to in the affidavits submitted by the Administrator (R. 149).

The district court granted the motion for summary judgment (R. 150–151), presumably on the ground that the sale of a commodity at a price in excess of that at which the seller actually delivered the commodity in March 1942 but not in excess of the seller's offering price for the commodity in

that month did not violate the regulation where the only deliveries of the commodity made by the seller in March 1942 were made under contracts antedating that month (Cf. R. 169). Judgment was thereupon entered in favor of the petitioner (R. 152). From that judgment the Administrator appealed (R. 153).

While the appeal was pending, this Court decided *Bowles* v. *Seminole Rock and Sand Co.*, (325 U. S. 410) in which it held that under Maximum Price Regulation 188 (a regulation in all material respects identical to the General Maximum Price Regulation), the highest price at which a commodity was actually delivered in March 1942, whether under a contract antedating that month or otherwise, was the maximum price at which the seller could lawfully sell the commodity. On the authority of this Court's decision in that case the Circuit Court of Appeals reversed the judgment of the district court and remanded the case for further proceedings, saying (R. 169):

> The question here presented is whether the General Maximum Price Regulation establishes the maximum price of a commodity at the highest price at which it was actually delivered during March, 1942, if the only deliveries in that month were under contracts made before March, 1942. In our former opinion we held that it does not. On June 4, 1945, the Supreme Court held that it does. *Bowles, Administrator,* v. *Seminole Rock & Sand Co.*

ARGUMENT

The decision of the court below is clearly right. It is not in conflict with the decision of any other appellate court. Nor does it decide any important question of law which has not already been decided by this Court.

1. Contrary to petitioner's contention, the present case cannot be distinguished from *Bowles* v. *Seminole Rock & Sand Co., supra,* on the ground that a different regulation is involved. The applicable provisions, and the General Maximum Price Regulation, which is involved in this case, are, as the court below observed (R. 169), in all material respects identical to those of Maximum Price Regulation 188 which was involved in the *Seminole* case. Furthermore, as the Administrator said in the Statement of Considerations, which he filed with the Division of the Federal Register when he issued Maximum Price Regulation 188, and as this Court pointed out in footnote 8 to its opinion in the *Seminole* case, Maximum Price Regulation 188 established maximum prices "'at the identical level of the General Maximum Price Regulation' for articles dealt in during March, 1942."

2. The proviso[2] which petitioner seeks to invoke has no bearing on any of the issues of this

[2] As amended by Amendment 38 (7 F. R. 10155) to the General Maximum Price Regulation on December 4, 1942, the proviso reads as follows:

Provided however, that:

(1) if before April 1, 1942, the seller raised his prices

case. Subject to exceptions not here material, the General Maximum Price Regulation provides

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for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except that to whom he was bound to make delivery or supply during March 1942 pursuant to a firm commitment made before the price rise) and

(2) *If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers*, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942 shall be deemed to be:

(i) The seller's increased offering price to such class of purchasers for delivery or supply during March 1942, or

(ii) If the seller had no such increased offering price to that particular class of purchasers, the highest price charged during March 1942 to a purchaser of a different class, adjusted to reflect:

(a) The seller's customary differential in price between the two classes of purchasers; or

(b) If the seller had no such customary differential, the actual percentage differential in price between the two classes of purchasers which existed at the time the seller last entered into a commitment, or if he did not enter into such a commitment, last submitted an offering price, for delivery or supply to a purchaser of that particular class during March 1942. [Italics supplied.]

This proviso was added by Amendment 23 (7 F. R. 6615). A provision identical to this proviso as modified by Amendment 38 was added to Maximum Price Regulation 188 by Amendment 3 to that regulation (7 F. R. 10155). This Court held that it was irrelevant in the *Seminole* case (footnote 9).

that the maximum price which a seller may charge a purchaser of any class for any commodity is the highest price at which he delivered the same commodity in March 1942 to *a purchaser of the same class.* The proviso, on which petitioner relies, is a modification and liberalization of a provision designed to preserve as nearly as possible the normal price structure of sellers having two or more classes of purchasers, such as wholesalers, retailers, institutions or governmental agencies, to whom they ordinarily sold at different prices. The sole purpose of the proviso is to avoid the abnormal differentials in a seller's maximum prices to various classes of purchasers, which would otherwise result in cases where the seller in March 1942 made deliveries of a given commodity at an increased price to one or more classes of purchasers (e. g. wholesalers and jobbers), but because of preexisting contracts made deliveries of the commodity in that month to one or more other classes of purchasers (e. g. retailers and consumers) only at prices in effect before the increase.

As the plain language of the proviso unequivocally shows, two conditions must be satisfied before the proviso becomes operative: First, the seller must have raised his prices for a commodity before April 1, 1942; and secondly, *he must have made a delivery of that commodity during March* 1942 *to at least one class of purchasers at the increased price.* Assuming for the pur-

pose of argument that the first condition has been met, it is plain that the second has not. The petitioner did not make any delivery at the increased price to any class of purchasers in March 1942 of any of the several models of gloves which it is charged with having sold in violation of the regulation. In fact it did not make any delivery of any such models at the increased price in March 1942. To sustain petitioner's contention it would be necessary to strike from the proviso the words "(2) If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers."

Far from sustaining petitioner's contention, the press releases to which petitioner refers on page 13 of its brief show beyond question that the proviso has no application whatever in this case. Those releases were issued when the Administrator promulgated Amendments 23 and 38 to the General Maximum Price Regulation, both of which amendments pertain to the proviso.[3] The press release of August 20, 1942 which accompanied the issuance of amendment 23 reads in part as follows (R. 98):

> From the outset the General Regulation adopted as the primary pricing test the highest price for which a seller de-

[3] The amendments are set forth at length on pages 99 and 103, respectively, of the record.

> livered a commodity or supplied a service in March. *To avoid abnormal price differentials among ceiling prices to various classes of buyers, such as wholesalers or retailers, the regulation permitted a seller who in March inaugurated a general price rise and made deliveries at the increased price to at least one class of purchaser to apply the increase to other classes of purchasers by maintaining his customary price differentials between various classes of buyers.* [Italics supplied.]
>
> The amendment liberalizes this provision to permit similar adjustment in these situations: (1) where a seller raised his prices before, as well as during, March 1942; (2) where a seller can establish the fact that he customarily had price differentials for various classes of buyers but cannot readily determine the amount of the differential, and (3) where a delivery was made after the price rise at a lower price under a previous contract.
>
> *As a safeguard against use of the provision where a price increase was used merely for bargaining purposes, the amendment requires that delivery or supply must have been made during March to at least one class of purchasers.* [Italics supplied.]

Likewise, the press release of December 5, 1942 which accompanied the issuance of Amendment 38 (R. 101–102), reads in part as follows:

> Hitherto the price-raise provision of these two regulations allowed a seller to

> apply his general price increase only to those classes of purchasers for whom the increase was announced before April 1 for delivery during March. Since there was no occasion for a seller to announce a price increase for delivery in March to customers under long-term contracts which did not expire in March, the price-raise provision was usually inapplicable to such customers.
>
> The new provision permits a seller to increase ceilings for goods delivered to customers under contract in March if the seller (1) announced a general increase prior to April 1, (2) *delivered some goods at the higher price in March*, and (3) delivered no goods in March at less than the new higher prices to such customers, aside from deliveries under the contract. [Italics supplied.]

The Statement of Considerations which the Administrator filed with the Division of the Federal Register in accordance with Section 2 (a) of the Act when he issued Amendment 38 makes it even more clear that the proviso is irrelevant to any of the issues of this case because of petitioner's failure to make any delivery of any of the particular models of gloves involved in this case at the increased price in March 1942. The Statement reads in pertinent part as follows:

> Under the Amendment substantially the same conditions as those formerly pre-

scribed must be met before the seller may obtain the benefit of the provision:

1. He must, prior to April, 1942, have increased his prices for a commodity or service to all his classes of purchasers or to all his classes of purchasers except those to whom he was bound to deliver or supply during March 1942 pursuant to firm commitments entered into before the price rise.

2. *He must, during March 1942, have delivered the commodity or supplied the service at the increased price to at least one class of purchasers.* [Italics supplied.]

Nor is there any merit to the argument made on page 14 of petitioner's brief that all models of gloves are to be treated as one commodity and that since petitioner delivered some models in March 1942 at the increased price the proviso is applicable. The petitioner manufactured several hundred models of gloves which in March 1942 it delivered or offered for delivery at prices ranging from a dollar a dozen to over eight dollars a dozen. If petitioner's contention were sound petitioner would be entitled to sell any of its gloves at the highest price at which it delivered any model in 1942. It could raise at will the price of any model so long as the highest price at which it delivered its most expensive model was not exceeded. Similarly, a manufacturer of shoes who in March 1942 delivered several models of shoes at prices varying from $5 to $15 a pair would be free to sell all models at $15 a pair. The devastating effect

which this would have on the price control program is obvious. The very purpose of the General Maximum Price Regulation was to freeze prices at their March 1942 levels. That purpose will be completely frustrated if all models of a general type are to be treated as one commodity for the purpose of the regulation.

Moreover, the regulation itself draws a clear distinction between the *same* and *similar* commodities. Thus it provides that if no charge was made for the same commodity in March 1942, the maximum price of any given commodity is the highest price charged for "the similar commodity most nearly like it" in March 1942;[*] and that "one commodity shall be deemed similar to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line." Section 2. Some of petitioner's models of gloves may be similar to others but none of them is the same. For the purpose of the regulation each model is to be treated as a separate commodity. This is

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[*] Like Maximum Price Regulation 188 the General Maximum Price Regulation prescribes a series of mutually exclusive formulas to be applied in sequence for determining the maximum price of any article. Only if the same commodity was neither delivered nor offered for delivery by the seller in March 1942 may the highest price charged for a similar commodity in March 1942 be resorted to for the purpose of determining the maximum price of any commodity.

clear not only from the plain language of the regulation but also from the administrative interpretation which has been placed upon it from the very date on which the regulation was issued. In the explanatory bulletin which was issued concurrently with the regulation and to which this Court referred in the *Seminole* case, the following interpretaions, among others to the same effect, are given:

> 2. Where the same articles have been sold under different brand names at different prices, the retailer cannot sell the lower priced brand at the same price as the highest priced brand. Different brands are different articles.
>
> * * * * *
>
> 8. A retailer sold five different style number dresses at $9.95 apiece. During March he raised the price on three of the most popular style numbers to $10.95 but sold and delivered only two of these three style numbers at a higher price of $10.95. Only those two style numbers may now be sold at $10.95. The maximum price of the other three style numbers is $9.95.

3. The district court did not, as petitioner contends, find that for each model of glove which petitioner delivered in March 1942 only at a price below that shown on its March 1942 price list, petitioner delivered in that month an

identical model at the price shown on that list. Petitioner asserts that the findings of the district court should be read with the district court's opinion (R. 129), and that when they are so read they include the finding which petitioner asserts the court made. It is obvious, however, that the statement as to the sale of "individual or equivalent" models in the opinion on which petitioner relies was not intended as a finding of fact. On the contrary, as the opinion of the Circuit Court of Appeals indicates (R. 169), it was made in the course of a discussion of a question of law, namely, when one commodity is to be deemed the same as another within the meaning of the regulation. Moreover, the only opinion rendered by the district court was filed at the time it denied the Administrator's application for an interlocutory injunction. At the hearing on that application, the Administrator, with a view to narrowing the issues, confined his proof to ten models of gloves. At the hearing on the motion for summary judgment, affidavits were submitted showing that after the effective date of the General Maximum Price Regulation, petitioner sold 115 models at prices in excess of the highest prices at which it had delivered those models in 1942 (although not in excess of the prices shown on petitioner's March 1942 price list). The district court made no finding whatever in respect to

these models, and the Circuit Court of Appeals was clearly right in holding that it had not done so.

Nor can petitioner draw any comfort from the allegation in the affidavit which it submitted in support of the motion for summary judgment to the effect "that for every lot number or description of glove not actually sold and delivered by the defendant during the month of March 1942, at the prices shown in the March 1942 price list, there was an identical or *substantially equivalent* glove sold and delivered by the defendant during March 1942, at the prices fixed in the March 1942 price list" [*Italics ours*] (R. 148). This allegation will not support the judgment. The regulation fixes the maximum price at which a seller may sell a commodity at the highest price at which the seller in March 1942 *delivered the same commodity*—not a substantially equivalent commodity. Moreover, whatever probative force the allegation would otherwise have had is completely destroyed by the succeeding paragraph of the same affidavit (R. 149) in which the affiant admits that he had no knowledge of, and could not identify, the 115 models which, according to the affidavits submitted by the Administrator, petitioner sold at prices in excess of those at which petitioner had actually delivered them in March 1942.

CONCLUSION

The decision of the court below is clearly right and no reason exists which would warrant its being reviewed by this Court.

Respectfully submitted.

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